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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-833

GUSTAVE CARL GALAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES, RESPONDENT, IN OPPOSITION

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I

PRELIMINARY

It is the position of the Petitioner, that by this Reply to Memorandum for the United States

in Opposition (hreinafter referred to as "MEMORANDUM") that Petitioner, rather than abandoning his contentions of the denial of the effective assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, and under due process clause of the Fourteenth Amendment to the United States Constitution, hereby reaffirms his legal position as coruscatingly set forth and supported by the entire Record in this case.

Petitioner intends, if and when a Writ of Certiorari is granted, to file his Brief, in depth, if deemed advisable, and in accord with the Supreme Court Rules to reflect that, as a matter of Fact and Law, the entire Record in this case supports the posit of Petitioner and patently establishes the abuse of discretion by the trial Judge in denying Petitioner a short continuance or severance to facilitate his Counsel's recovery to afford Petitioner the assistance of effective counsel.

With a broad general allusion in the Memorandum, the Solicitor General for the United States ignores the actual crucial dilemma of Petitioner at the trial, by by-passing the critical colloquy in the presence of the jury and by reference to facts which are not supported by the Record, and by citation of cases not applicable or pertinent to the facts in the Record or within the concept of the law, applicable to this case.

II

THE FACTS REFERRED TO BY THE SOLICITOR GENERAL ARE NOT SUPPORTED BY, NOR IN ACCORD WITH THE RECORD OF THE CASE

(a) Respondent states (Memorandum p. 1 - par. 1), that Petitioner " - - was deprived of effective counsel because the trial court denied a continuance requested because of an alleged eye injury -- " [Emphasis ours].

Counsel for Petitioner filed two affidavits, the morning of August 8, 1974, with the trial court relative to his physical condition (R. 2 - p. 7, lines 3-22).

In the affidavit of August 5, 1974, Mr. Cantillon, trial counsel for Petitioner stated (Clerk's Transcript, hereinafter referred to as C. Vol. 1 - p. 58):

> "1. On the 4th day of August, 1974, I sustained severe injury to the region of my right eye as a consequence of which my vision is substantially impaired.
>
> "2. I am counsel of record for Gustave Carl Galas.
>
> "3. I received emergency treatment from Michael Gurdin, M.D. on

August 4, 1974 and again on August 5th. I am attaching herewith a certificate signed by Dr. Gurdin confirming my disability.

"4. I am making this affidavit for the purpose of obtaining a continuance of the within case, in accordance with the certificate of Dr. Gurdin for the period of seven to fourteen days.

"5. I am taking antibiotic and sedative medication. I am willing to submit myself to any examination by any court appointed physician, if there is any question regarding the authenticity of this affidavit. [Emphasis ours]

Further, Affiant says not.

/s/_____
James Cantillon

Subscribed and
sworn before me
this 5th day of August, 1974
Thomas D. Mercola
Notary Public."

On the same day, August 5, 1974, Dr. Michael Gurdin made his certificate, "He will be disabled from work for approximately seven to fourteen days." (C.T. 1, p. 60.)

A second affidavit was filed by Mr. Cantillon, dated August 8, 1974 (C.T. 1, pp. 65-66).

"AFFIDAVIT OF JAMES P. CANTILLON (C.T. Vol. 1 - pp. 65-66) as follows:

"STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

"JAMES P. CANTILLON, being first duly sworn, deposes and says:

"1. That he is the attorney of record for the defendant GUSTAVE CARL GALAS in the above entitled criminal proceeding. That he executed and filed an affidavit with the court on August 5, 1974, setting forth medical reasons for his inability to proceed to trial. That the court refused to grant the defendant a continuance but rather is forcing him to trial with affiant as counsel.

"2. In addition to those matters set forth in affiant's affidavit filed on August 5, 1974, affiant by this affidavit informs the court of his disability being caused not only by the injuries he sustained, but by the medication which he has been compelled to take.

"3. Affiant is presently taking valium, Darvon, Dalmaine and Cleocin. That Valium is a tranquilizer which acts as a depressant to the central nervous

system. That Dalmaine is a hypnotic and sedative to induce sleep. That Darvon is 'a pain killer.' The combination of these three drugs has induced a condition which has impaired the affiant's mental alertness, caused him to stagger on occasion, has induced a lethargic and depressed feeling, has caused the affiant to become confused and has induced drowsiness and memory impairment.

"4. That the affiant is not a medical expert but in that regard would refer the court to the Physician's Desk Reference (PDR) which explains the pharmacology and effects of the above mentioned drugs. That affiant's doctor informs him that the effect of each of the above three mentioned drugs is accentuated when they are taken in conjunction with one another. In other words, each of the above drugs potentiates the others.

"5. That all of the above described medication has been prescribed for me by my physician and has been administered by the affiant according to the doctor's instruction in the prescription.

"6. That no other attorney is knowledgeable enough about the facts in this case to effectively represent the defendant through a trial. Because of the condition induced by the above

mentioned drugs, affiant cannot competently represent the defendant through a trial.

"7. In addition to the above, because of the injury to my right eye, I am suffering impairment of vision and depth perception which causes me to experience vertigo at times.

"Further, affiant says not.

/s/_____
JAMES P. CANTILLON"

Subscribed and sworn
to before me this
7th day of August, 1974.
Thomas D. Mercola, Notary Public."

The affidavit of Warren O. Cagney, Jr., M.D., establishes his specialty - anesthesiology and the administration of all drugs thereof:

That Mr. Cantillon has been under medical care following a serious operation for diverticulitis, which requires a long post-operative recovery:

That Mr. Cantillon sustained a serious fall which required medication, Valium, Darmon and Dalmaine, respectively, three or four times a day, four times a day and at bedtime.

We have quoted in the Petition (p. 5 thereof), as to Doctor's opinion if an attorney attempted to represent a client while under the influence

of these drugs. He opined it could constitute malpractice.

The proffer of Mr. Cantillon to be examined was not exercised.

The Court apparently believed and concurred with the statement of Mr. Cantillon, for it stated (R. 2; p. 9, lines 12 through 14, also quoted in Petition p. 8):

> "THE COURT: I don't want anyone in this courtroom to think that I believe that you are misrepresenting the facts of your physical condition -- ."

In the Court's assessment of Mr. Cantillon's physical condition it therein concurred that Petitioner herein (defendant Galas) could not be effectively represented by Mr. Cantillon.

(b) The Solicitor General stated (Memorandum p. 2):

> "the result was that the taxpayer's whose returns Petitioner prepared -- " [Emphasis ours.]

That is a grievous solecism on the part of the Solicitor General that compounds the abuse of discretion by the trial Judge in denying a short continuance.

The indictment filed April 15, 1975 identifies four individuals, as allegedly having filed false and fraudulent income tax returns. These were:

Count One - Gilbert A. McAdams
Count Two - James R. Harris
Count Three - Edward A. Nevin
Count Four - Robert M. Crawford
(C.T. 1 - pp. 1 through 5.)

Mr. Stephen Wilson, Deputy United States Attorney, represented the Plaintiff at the trial.

He stated, in his opening address to the Jury (R. 2 - p. 24, lines 16-21):

> "I should mention, ladies and gentlemen, that with regard to the Schedule F on both Dr. McAdams' return and Dr. Harris' return, it was prepared by the Certified Public Accountant, Mr. Monroe ---."

Schedule F is part of the income tax of taxpayers reflecting the depreciation deductions, and is attached to the Income Tax Return of each of the above-named four individuals.

Plaintiff's EXHIBIT I - Tax Return of McAdams prepared by George O. Alger, 5-12-68

Plaintiff's EXHIBIT 22 - Tax Return of Harris prepared April 12, 1968 by Marvin J. Agee, Certified Public Accountant,

Whittier, California

Plaintiff's EXHIBIT 39 - Tax Return of Nevin prepared 3-16-69 by Ward O. Faoro, C.P.A.

Plaintiff's EXHIBIT 48 - Tax Return of Crawford prepared Apri. 14, 1969 (what appears) to be James Elmore & Associates, Certified Public Accountants.

Hence, neither the tax returns of said Four Individuals nor the Four Schedules "F" attached to the tax returns were prepared by Petitioner, as erroneously stated by the Solicitor General.

A study and survey of the Plaintiff's Exhibits confirm and verify that the Petitioner did not prepare either the tax returns or the attached Schedules "F".

(c) The Solicitor General (Memorandum pp. 3 and 4) quoted the statements of the trial court to Mr. Cantillon at the hearing on September 23, 1974, after the verdict of guilty had been returned.

The trial court stated that Mr. Cantillon was acting, and that for the record the Court felt Petitioner had a fine attorney, who did not suffer from anything that rendered him less than almost admirably capable of giving legal representation to his client.

Let us examine this inexplicable ambivalence in the statements made by the trial court in the presence of the Jury, and thereafter to Cantillon after the verdict.

It establishes by admission of the trial court that Mr. Cantillon was in an extremely debilitated mental condition. He was heavily medicated, suffering from vertigo, and his emotions and memory were affected from the use of the medication and from drugs he was taking (R. 2 - p. 7, lines 10 through 21).

The Judge accepted the statement from Mr. Cantillon as to his health, but appeared more concerned with having the matter heard at the earliest possible time rather than, as offered by Mr. Cantillon having him examined or Mr. Anthony interrogated to determine how effective they would be in representing Petitioner Galas (R. 2 - p. 7, line 2 through p. 15, line 8).

In fact, the court was repeatedly informed by Mr. Anthony that he was unprepared, had no knowledge of the facts of the case, and that Mr. Galas wanted Mr. Cantillon as the attorney of Petitioner's choice.

In fact, the trial Judge went so far as to point out when ordering Mr. Anthony to represent defendant Galas, that he (the trial Judge) would consider it negligence on the part of Mr. Cantillon if Mr. Anthony was not prepared to proceed with the case (R. 2 - p. 8, line 17).

Strangely, even though the trial court deemed it negligence if Mr. Anthony was not prepared, the court refused to make inquiry into the ability or extent to which Mr. Anthony was prepared.

It appears, therefore, the court had concluded Mr. Cantillon was in such a physical condition he could not proceed to trial by himself, that a backup counsel, who became primary counsel, interchangeably, was required. Mr. Anthony later requested a hearing to determine his preparedness (R. 2 - p. 73, lines 16 through 25; p. 74, lines 1 through 8).

The trial Judge was also influenced by another trial which was to start the following week in which Mr. Cantillon was one of counsel for defendants therein (R. 2 - p. 14, lines 23 through 25; p. 15, lines 1 through 8).

Finally, the Solicitor General points out, on the third day, the Court stated Mr. Cantillon's health had improved to such an extent he could excuse Mr. Anthony from the proceedings.

Thusly, at least until the third day, the Court feels the necessity for another attorney to take over or back up. The Record does not reflect when the Court suddenly felt a backup attorney was not needed. Further, there is no evidence to justify when a backup attorney was no longer needed.

It is clear that the order of the trial court that Mr. Anthony proceed, after Mr. Anthony advised the court that he was unprepared, did not cure or ameliorate the court's abuse of discretion in not granting a continuance as requested by Mr. Cantillon or a severance of defendant Galas.

In Calloway v. Powell, 393 F.2d 886 (1968) the court stated:

> "The right to counsel is the right to effective counsel . . . this court has interpreted counsel to mean 'not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonable effective assistance' . . . . Effective counsel includes familiarity of counsel with the case, and an opportunity to investigate it if necessary in order meaningfully to advise the accused of his option. . . . Under the circumstances revealed by this record it is apparent that appointed counsel surprised by being called to the arraignment, and having only a brief conference with the accused in the courtroom, did not measure up to the constitutional requirement."

Mr. Anthony told the Judge he was unprepared. He was confounded and surprised at being asked to represent Mr. Galas in a complex criminal proceeding.

In McKenna v. Ellis, 280 F.2d 592 (1960), the Fifth Circuit dealt with effective assistance of trial counsel. The trial Judge in absence of an attorney who was to appear, appointed two young attorneys to represent McKenna who was convicted.

The Fifth Circuit, in reversing, stated:

> " - - - He [the accused] is entitled to the effective, wholehearted assistance of counsel and to the undivided loyalty of counsel. Finally, he is entitled to have his trial guided by a Judge sensitive to the duty of protecting the accused's constitutional rights in all cases, but especially when fledgeling lawyers are appointed over the protest of the accused."

The court then continued:

> "[A] trial judge who appoints fledgeling attorneys as defense counsel, over defendant's protest, cannot wash his hands of their mistakes. . . ."

Another caveat was propounded in the Ellis case, at p. 601:

> " - - - A genuflection in the direction of justice by the pro forma appointment of counsel, such as McKenna had is something less than adequate judicial guidance and the furnishing of effective counsel to an accused."

The language cited by the Solicitor General, after the verdict, and given as a statement by the court to Mr. Cantillon (R. 6 - pp. 921-922) appear to be genuflections in the direction of justice, after thoughts, belated and do not, nunc pro tunc, cure the patent abuse of discretion of the trial judge in this case.

Although the trial court on two occasions denied the Petitioner the rights to be heard! - (R. 2 - p. 13, lines 16-18; and again R. 2 - p. 16, lines 16-21) during the court's colloquy on the immediacy of trial and colloquy with Mr. Cantillon, when the latter stated (R. 2 - p. 16, lines 8-10):

> "Mr. Cantillon: In our opinion Mr. Galas is being denied due process of law."

Nonetheless, the court (R. 2 - p. 121, lines 17-24) permitted Mr. Galas to join Mr. Cantillon and Mr. Anthony to inquire of any witness by cross-examination in behalf of the Petitioner.

The court at the same time alluded to the fact that Galas was a tax expert.

This statement by the trial court was made before a Jury and the court indicated it was based on evidence.

The only evidence given thereon was by the witness, Dr. McAdams, who stated under cross-examination by Mr. Shekoyan, attorney for defendant Crum (R. 2 - p. 81, lines 5-8) as

follows:

"Q. (By Mr. Shekoyan) It was your understanding in October of 1967 then that Mr. Galas was a tax lawyer?

"A. Yes."

Petitioner Galas in direct examination stated (R. 4 - p. 391, lines 9-18):

"Q. Have you ever held yourself out to be an expert in the law of taxation or tax.

"A. No, not as an expert in the sense that I would be a tax lawyer practicing before the tax court or anything of that sort, no.

"Q. Are you licensed to practice before the tax court?

"A. No.

"Q. Have you ever been?

"A. No."

The trial court drew an inference from McAdams' testimony that defendant Galas was a tax expert.

This presented a bias against Petitioner for it was serving Dr. McAdams' self-interest to

characterize Mr. Galas as a tax expert; therefore, Dr. McAdams would appear as innocent. He might legally have been a co-conspirator.

Moreover, an issue of fact arose by contradictory testimony which became a question for the Jury. The court's statement, in the presence of the jury represented a conclusion which the jury should not, but did accept, since the trial Judge so indicated.

Neither Mr. Cantillon nor Mr. Anthony objected or made a motion to strike the court's gratuitous statement.

Petitioner was not protected, at the most crucial moment, which if competently handled could have resuled in a directed verdict of acquittal of Petitioner.

a - Plaintiff's (in trial court) Exhibit 2, a Purchase Offer was presented to Dr. McAdams (R. 2 - p. 39, lines 19 through 26).

b - In response to questions by Mr. Wilson with respect to portions of said G.E. 2, Dr. McAdams (R. 2 - p. 40, lines 18-25) stated:

"A. Well, part of it was written by Mr. Crum. Part of it was written by Mr. Galas.

"Q. Can you be more specific as to which portion was written by Mr. Galas?" (R. 2 - p. 41, lines 1-9.)

"A. Yes, the top portion, including the figures and the total purchase price and so on was written by Mr. Galas, and the portion having to do with kits and how they would be owned was done by Mr. Crum." [Emphasis ours.]

"Q. When did you sign that document Exhibit 2, Doctor?

"A. April 9, 1968."

Mr. Galas testified, on cross-examination by Mr. Wilson, United States Attorney (R. 4 - p. 446, lines 11-25):

"Q. And this purchase offer that Dr. McAdams signed, that would be Government's Exhibit 2, if you would like, you may look at it, Sir." (Whereupon Exhibit placed before the witness.)

By Mr. Wilson:

"Q. Did you prepare that purchase offer?

"A. No.

"Q. You will note part of the purchase offer is printed and part is written; did you perform any of the writing on that agreement?

"A. None whatsoever.

"Q. Nothing on that Agreement is yours.

"A. None whatsoever, no part of it."

Without his debility, accidently occurring, Mr. Cantillon, commensurate with his ability, would have on this phase, of this testimony by Dr. McAdams on cross-examination of him, in depth and detail, requested and invoked handwriting experts, who would readily establish the handwriting on G.E. 2, the purchase offer.

It is climactic and would have been determinative of Petitioner's position; present counsel sincerely believes that Dr. McAdams was overzealous in testifying that Petitioner did write on G.E. 2, which Petitioner steadfastly denies. The truth as to said actual handwriting presented to the jury by experts would easily resolve the matter since, certainly, the handwriting can be determined and would have been with specificity, if Petitioner's counsel had been effective and not suffering and ingested with drugs, rendering him ineffective and not competent for the trial.

III

THE CASES CITED BY THE SOLICITOR GENERAL ARE INAPPLICABLE ON THE FACTS AND LAW OF THIS CASE

(a) United States v. Makley,
(1972) 468 Fed.2d 916

Defendant contended that trial court abused its discretion in denying his motion for a continuance or a mistrial due to his alleged surprise when a codefendant testified for the prosecution. The Appellate Court stated (p. 917):

> "Neither by motion for new trial nor otherwise did Makley demonstrate any such sufficient prejudice resulting from the District Court's denial of his motion as to induce us to hold that an abuse of discretion occurred."

In the instant matter, the Record is replete with motions for a new trial, on all the grounds raised during the trial, which were denied.

To a large extent, this is tantamount to a case of first impression. Competent counsel, by accident two days before trial, is rendered ineffective and incompetent, due to injury, medicine and drugs required medically to be taken. Under oath, he admits his vertigo,

dizziness, loss of memory, must sit down, cannot check Exhibits, in fact cannot function compatible with the necessity; as a result, defendant is in a dilemma, with one counsel, unprepared, not of his choice, counsel of his choice, ineffective through no fault of his own; a colloquy before a jury which unquestionably prejudices defendant's case; in fact, the trial is a hodge-podge. The denial of a short continuance in this matter clearly represents an abuse of discretion by the trial Judge.

(b) United States v. Young,
(1972) 470 F.2d 962, 964 (C.A. 9)
cert. denied 410 U.S. 967 and
cases cited therein.

This case is silent as to the basis of a continuance; at page 964, the Court states:

> "Motions for continuance are within the sound discretion of the trial judge,"

and cites cases enunciating the general law.

But where there is a constitutional violation, as in this instant case, a denial of effective counsel, a request for a continuance for a short period is not for delay, but in the interests of constitutional justice; and a denial of the continuance, in this matter, represents an abuse of discretion by the trial Judge.

It is presumed the request for continuance in the Young case was predicated on the failure

to give the defendant a list of government witnesses prior to the day of trial. The Court, again, in the Young case, held that the government is not obliged to disclose the names of its witnesses, citing cases.

In the cases cited with respect to continuances (p. 964) of the Young case, the motions were based on standard reasons, none of which involved a clear abuse of the trial judge's discretion, as is clearly evident, in proliferation, in the present matter, as evinced in the entire Record.

(c) United States v. Casey, (1973) 480 F.2d 151

The Appellate Court stated (p. 152):

> "On the day of trial Mr. Casey employed an attorney for the sole and limited purpose of entering a motion for a continuance.
>
> "We agree with the lower court that Casey had a reasonable time to procure counsel and was financially able to do so.

The facts nor law are pertinent to this case.

But the language and citation by the Fifth Circuit in the Casey report is pertinent and applicable to the facts and law in this matter.

At page 152, in a Per Curiam opinion, the Fifth Circuit Court stated:

> "The facts of a particular case determine whether or not the denial of a request for a continuance to to obtain counsel is a violation of a person's Sixth Amendment Guarantee. Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)."

In Ungar v. Sarafite, 376 U.S. 575 (1964) at p. 589, the Court refers to the case of Chandler v. Fertag, 348 U.S. 3, as authority for, "contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."

In the Petition for a Writ of Certiorari (at page 15), we cited the case of Reynolds v. Cochran, 365 U.S. 526, 31 S.Ct. 723, which, in turn cited the case of Chandler v. Fertag (1954) 348 U.S. 3, which held "emphatically clear that a person proceeded against as a multiple offender has a constitutional right to the assistance of his own counsel in that proceeding."

The Chandler v. Fertag case stated (at page 9):

> "Regardless of whether Petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."

(at page 10)

> "By denying Petitioner any opportunity to employ and consult with counsel --- to obtain counsel ---, the trial court deprived him of due process of law guaranteed by the Fourteenth Amendment."

May we paraphrase:

By denying Petitioner herein, through his counsel of his choice, a short continuance to render him competent and effective, having become disabled physically two days before trial, and by medicine and drugs prescribed by a doctor for his accident and condition, the trial court deprived him of assistance of effective counsel and of due process as guaranteed by the Fourteenth Amendment.

Counsel for Petitioner did not desire the accident, the injury, the discomfiture and inability to function effectively; the Record is eloquent on his ineffectiveness due to his injury and required intake of drugs and medicine. There was an effective abuse of discretion by the trial court in denying a short continuance or severance.

IV

CONCLUSION

For all of the reasons hereinabove set forth, factual and legal, it is respectfully submitted that judgment be set aside as to all four counts, and the conviction reversed.

Dated: March 1, 1976

Respectfully submitted,

HERBERT E. SELWYN

Attorney for Petitioner